Supreme Court, U.S.
FILED
NOV 17 1980
MICHAEL RODAK, JR., CLERK

80-797

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

RANDY L. HART,

Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE
(COMMUNITY COLLEGE OF BALTIMORE), et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BARBARA GOLD
1520 Fidelity Building
210 North Charles Street
Baltimore, Maryland 21201
Counsel for Petitioner.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

RANDY L. HART,

Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE
(COMMUNITY COLLEGE OF BALTIMORE), et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals preserve Petitioner's Seventh Amendment right to a jury trial and Fifth Amendment right to due process of law when it held that the District Court judge should have granted a directed verdict for all defendants and when it dismissed his complaint

without detailing the defects it stated it found in his prima facie case although he had won a jury verdict as to his civil rights claims and a court verdict as to his employment discrimination claims?

2. Where the Court of Appeals held that the District Court judge should have granted a directed verdict for all defendants, did due process require that, instead of dismissing the case, the Court of Appeals remand the case for a new trial so that Petitioner could have had the same opportunity to remedy any defects he would have had if he had taken a voluntary nonsuit, as he could have done in the District Court?

3. Was the Court of Appeals correct when it held that Petitioner's case had been insufficient to go to the jury?

ALL PARTIES TO THE PROCEEDING

The parties to the proceeding in the court below were Randy L. Hart, appellee; and the Mayor and City Council of Baltimore (Community College of Baltimore) and James Henry, appellants. Rafael Cortada, President of the Community College of Baltimore, was dismissed as a defendant in the case by the District Court of Maryland.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW	i
ALL PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OFFICIAL REPORT	1
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR ALLOWANCE OF THE WRIT	7
CONCLUSION	19
APPENDIX A - Order, United States Court of Appeals for the Fourth Circuit, denying Petition for Rehearing	1a
APPENDIX B - Opinion, United States Court of Appeals for the Fourth Circuit, reversing judgment of the District Court	2a
APPENDIX C - Opinion, United States District Court for the District of Maryland, Northrop, C.J.	7a
APPENDIX D - Judgment, United States District Court for the District of Maryland, Northrop, C.J.	12a

TABLE OF AUTHORITIES

Arlington Heights v. Metro Housing Corp., 429 U.S. 452 (1977) 8

Baltimore & Carolina Line v. Redman, 295 U.S. 654 (1935) 12

Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) 14

Board of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978) 10

Capital Traction Co. v. Hof, 174 U.S. 1 (1899) 12

Carey v. Piphus, 435 U.S. 247 (1978) 10

Chambers v. G.D. Searle & Co., 441 F.Supp. 377 (D.C. Md. 1977), aff'd 567 F.2d 269 16

Corley v. Jackson Police Department, 566 F.2d 994 (5th Cir. 1978) 15

Curtis v. Loether, 415 U.S. 189 (1974) 12

Dimick v. Schiedt, 293 U.S. 474 (1935) 13, 14

Dyer v. MacDougall, 201 F.2d 265 (CA2 1952) 10

E.E.O.C. v. United Virginia General/Seaboard National, 555 F.2d 403 (4th Cir. 1977) 15

Ex Parte Peterson, 253 U.S. 300 (1920) 13

Galloway v. United States, 319 U.S. 372 (1943) 12

Hammitte v. Livesay, 436 F.2d 1134 (6th Cir. 1971) 16

Hart v. Mayor and City Council of Baltimore (Community College of Baltimore), et al, 625 F.2d 13 (1980) 1, 3, 4, 5

Holiday v. Johnston, 313 U.S. 342 (1941) 9

Lewis v. Tobacco Workers International Union, 577 F.2d 1135 (4th Cir. 1978) 15

Mayo v. Lakeland Highlands Canning Co., 309 U.S. 316 (1940) 14

Morgan v. United States, 298 U.S. 468 (1936) 9

Mosley v. CIA, MAR, ADRA, S.A., et al, 314 F.2d 223 (2d Cir. 1963), cert. den. 375 U.S. 835 (1963) 15, 16

Neely v. Martin K. Eby Construction Co., 386 U.S. 317 (1967) 7, 8, 11, 13

Owen v. Commercial Union Fire Insurance Co., 211 F.2d 488 (4th Cir. 1954) 15

Parklane Hosiery Co. v. Shore, 439 U.S. 232 (1978) 11

Patrician Towers Owners, Inc. v. Fairchild, 513 F.2d 216 (4th Cir. 1975) 15

Ross v. Bernhard, 396 U.S. 531 (1970) 12

Shelton v. Jones, 356 F.2d 426 (4th Cir. 1966) 16

Slocum v. New York Life Insurance Co., 228 U.S. 364 (1913) 11

Thompson v. McDonnell Douglas Corp., 416 F.Supp. 972 (D. Mo. 1976), aff'd 552 F.2d 220 (8th Cir. 1977) 8

United States v. Commonwealth of Virginia, 569 F.2d 1300 (4th Cir. 1978) 15

United States v. Oregon Medical Society, 343 U.S. 326 (1952) 10

United States v. U.S. Gypsum Co., 333 U.S. 364 (1948) 7

United States v. Yellow Cab Co., 338 U.S. 338 (1949) 7

Walker Mfg. Co. v. Dickerson, Inc., 560 F.2d 1184 (4th Cir. 1977) 16

Wingo v. Wedding, 418 U.S. 461 (1974) 10

Constitutional Provisions

United States Constitution, Amendment V 1

United States Constitution, Amendment VII 1

Statutes

Civil Rights Act of 1964, 42 U.S.C. 1983 ..... 2, 3

Equal Employment Opportunity Act of 1974, as amended, 42 U.S.C. 2000e et seq. 2, 3, 4

Federal Declaratory Judgment Act, 28 U.S.C. 2201 et seq. 3

Rehabilitation Act of 1973,
29 U.S.C. 794 3

Other Authorities

Holmes, Collected Legal Papers 9

OFFICIAL REPORT

Hart v. Mayor and City Council of Baltimore (Community College of Baltimore), et al, 625 F.2d 13 (4th Cir. 1980).

JURISDICTIONAL STATEMENT

On July 10, 1980, the United States Court of Appeals for the Fourth Circuit issued the opinion cited above. A Petition for Rehearing was duly filed on July 24, 1980, and, on August 18, 1980, the Petition for Rehearing was denied. Jurisdiction of this Court to review the judgment in question is invoked pursuant to 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment to the Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Seventh Amendment to the Constitution:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the

right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

3. Civil Rights Act, 42 U.S.C. 1983:

Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

4. 42 U.S.C. 2000e-2:

(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

On November 5, 1976, Randy L. Hart filed a complaint with the Equal Employment Opportunity Commission which, on October 6, 1977, found reasonable cause existed to believe the Community College of Baltimore had violated Title

VII by refusing to promote him. Efforts at conciliation were ignored by the defendants, and Hart was issued a Right to Sue letter by the Justice Department on April 26, 1978, which he received on April 28, 1978.

On July 26, 1978, Hart brought an action under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), 42 U.S.C. 1981, 1983, and Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), alleging that he had been denied a position as a full-time counselor for the Veterans Upward Bound program at the Community College of Baltimore because of his race or handicap. Declaratory relief was sought under the Federal Declaratory Judgment Act, 28 U.S.C. 2201, et seq. Hart v. Mayor and City Council of Baltimore (Community College of Baltimore), et al, 625 F.2d 13 (4th Cir. 1980).

The District Court submitted the Section 1981, 1983 and 794 claims to the jury. Id. At the close of the evidence, the trial judge granted directed verdicts for the College and its President on all issues except for a Section 1983 claim against Henry, the Assistant Director of the Veterans Upward Bound program, in his individual capacity. The jury returned a verdict against Henry in the amount of $7,500.00. Id.

The Title VII claim then was tried to the District Judge, who accepted the earlier jury finding of discriminatory intent on the part of Henry and awarded $31,452.00 as back pay against the College and Henry on that claim. Id.

The College and Henry appealed, arguing that Hart had failed to establish a prima facie case of employment discrimination.

On July 10, 1980, the United States Court of Appeals for the Fourth Circuit issued an opinion holding that, as a matter of law, Hart, a white, part-time counselor of veterans at the Community College of Baltimore, had failed to establish a prima facie case of race or handicap-based discrimination regarding the College's failure to promote him to full-time veterans counselor.

Although Hart had sustained his burden of proof, the Court of Appeals misunderstood the evidence supporting key elements of the case and held that he had not sustained his burden. A single footnote encapsulates the enormity of the appellate court's misunderstanding:

> The handicap referred to was a rating of 30% disability due to a chemical imbalance of lithium which intermittently affects Hart's emotional state. However, the evidence at trial showed that most people familiar with Hart were unaware of this condition and that his chemical

imbalance did not adversely affect his job performance.

Hart, supra.

In fact, the key element in Hart's case was that defendant Henry had made the people who would evaluate Hart for the job he wanted fully aware of the handicap, and that Henry had done so for reasons of racial prejudice. The testimony revealed that the handicap was a chemical imbalance which nobody could explain, and not a lithium imbalance; lithium was the therapeutic mechanism used. The members of the job interview committee were not only fully aware of this condition, but they had been made aware of it not by any manifestations of it on the part of Hart, but by Henry, one of the defendants in the case, Hart's supervisor, and a member of that selfsame interview committee. Hart's job performance was not, as assumed in the footnote, the key issue. The prejudice deliberately created by Henry's use and communication of his personal knowledge of Hart was the key.

In order to make that footnoted statement, the Court of Appeals had to ignore completely the following evidence, inter alia, which had been presented at trial.

In April of 1975, Hart, who then was working as a part-time counselor of veterans at the

College, requested and received a leave of absence from his job to enter Perry Point Hospital for treatment of a nervous condition, which developed in Okinawa and led to his honorable discharge from the Marine Corps. This condition resulted from the imbalance erroneously defined in the Court of Appeals footnote. (App. 130, 146, 154)

At the end of three weeks, Hart got a standard letter from his doctor, as would any other employee of the Community College of Baltimore who had been absent for reasons of health, and presented it to his supervisor, Henry. (App. 239, 382, 390-2)

Henry, instead of taking Hart back into the program, went to the program director and to a dean, saying that emotional illness was different from physical illness, for which only a doctor's letter was required on return, and requesting permission to write his own letter to officials at Perry Point Hospital to ask for more information. Such a letter was not part of the College's policy. All this was brought out in evidence. (App. 383, 146-7, 182-9, 234-41, 271-4, 278-80)

Later that year, the position of full-time counselor opened up. (App. 215-6)

Hart applied for it and found himself being judged by the very people who had been

told of his alleged emotional instability by Henry. The evidence showed that handwritten notes by committee members indicated their awareness of Hart's handicap, and, more important, that the practice of the Veterans Upward Bound program was, historically, to promote from within. (App. 305-7,265-71, 97-104, 114-5, 403-10)

The Court of Appeals improperly repeats the College's version of this test and does not take the evidence, including that of custom, practice, and racial prejudice, as conceded by an adverse witness, against Hart in the light most favorable to Hart's case, as that Court was bound to do. United States v. U.S. Gypsum Co.,333 U.S. 364, 394-5 (1948); United States v. Yellow Cab Co.,338 U.S. 338, 341-2 (1949).

The Court of Appeals also improperly asserts that "counsel for Hart conceded no genuine claim existed for employment discrimination on the basis of handicap." Counsel conceded no such thing.

Counsel agreed, in response to a question from the Court, that the jury appeared to have been significantly more impressed with the race issue than with the handicap issue.

In fact, this meant that the jury and, later, the judge understood the theory of Hart's counsel and accepted it, for Hart's counsel

had argued to the jury that the handicap issue provided a convenient cover for the exercise of the racial prejudice which was the College's primary reason for wanting to get rid of Hart, who was the last white left in the program in a counselling capacity. That is the theory the Court of Appeals should have looked at in a light most favorable to Hart. That is a theory which is subtle to grasp, critical to the case, and, in no way subject to the inexplicably damaging concession the Court of Appeals has invented.

REASONS FOR ALLOWANCE OF THE WRIT

A. This Court Should Re-Examine the Policy Implications of Permitting an Appellate Court to Summarily Reverse a Trial Verdict in a Case as Complex and Difficult as One Involving Discrimination.

This Court has stated, in dicta, that summary reversal, amounting to the granting of a judgment notwithstanding the verdict, by an appellate court of a verdict granted by a jury is procedurally and constitutionally appropriate. Neely v. Martin K. Eby Construction Co., 386 U.S. 317 (1967).

Petitioner's case demonstrates how important it is that the policy implications of this dicta be re-examined, because Petitioner's case illustrates perfectly the pernicious results of such a policy when it is applied not to the relatively straightforward facts of Neely, but to the complex facts of a discrimination case, which, by its nature, involves concealed motives difficult to evaluate by anyone who does not see the witnesses and hear their testimony. Thompson v. McDonnell Douglas Corp., 416 F.Supp. 972, 982 (D. Mo. 1976), aff'd 552 F.2d 220 (8th Cir. 1977); Arlington Heights v. Metro Housing Corp., 429 U.S. 452, 465 (1977).

There is no way to convince a litigant whose case has been summarily dismissed, after administrative investigation found merit in his claims, and after judge and jury found merit in his claims, that he has received justice. Such a litigant cannot help but believe that something fundamentally unfair has happened to him, and the likelihood of this belief alone is reason for this Court to re-evaluate and clarify the implications of the Neely dicta. Faith in the jury system is one of the fundamental faiths of the American judicial system. Juries represent the layman's common sense, the "passional ele-

ments in our nature," and thus keep the administration of law in accord with the wishes and feelings of the community. Holmes, Collected Legal Papers, 237 (1920).

Thus, Petitioner was denied the benefit of one of the most deeply engrained principles in Anglo-American jurisprudence, which requires that an official entrusted with finding facts must hear the testimony on which findings will be based.

The principle that "(t)he one who decides must hear," Morgan v. United States, 298 U.S. 468, 481 (1936), is supported by two distinct rationales. First, judicial factfinding on the basis of a written record carries an intolerably high risk of error. Any experienced lawyer is aware that findings of fact frequently rest on impressions of demeanor and other factors which do not appear on the face of the record. As the Court stated in Holiday v. Johnston, 313 U.S. 342, 352 (1941), "(o)ne of the essential elements of the determination of the crucial facts is the weighing and appraising of the testimony." Accordingly, the Court has rejected the proposition that an appraisal of the truth of testimony by other than judge or jury is, in the light of the purpose and object of the proceeding, the equivalent of the judge's own exercise of

the function of the trier of the facts. Id. See: Wingo v. Wedding, 418 U.S. 461 (1974); United States v. Oregon Medical Society, 343 U.S. 326, 339 (1952); Dyer v. MacDougall, 201 F.2d 265, 268-9 (CA2 1952).

The principle, however, is not based solely on the constitutional interest in accurate factfinding. It also derives from the notion that, as a matter of basic fairness, a person facing the prospect of grievous loss is entitled to relate his version of the facts to the official entrusted with judging its accuracy. The due process clause promotes participation and dialogue in the decisionmaking process by ensuring that individuals adversely affected by governmental action may confront the ultimate decisionmaker and thus play some part in formulating the ultimate decision. See: Carey v. Piphus, 435 U.S. 247 (1978); Board of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78, 103, n.15 (1978).

B. The Appellate Court's Action Did Not Preserve Petitioner's Right to a Trial by Jury or to Due Process of Law.

The Seventh Amendment to the Constitution guarantees that the "right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any Court of the United States than according to the

rules of common law."

The appellate court's summary dismissal left Petitioner without either a sufficient explanation or an opportunity to appeal beyond that court, an opportunity he would have had if the trial court had granted a motion notwithstanding the verdict. This lack of explanation and opportunity to appeal is what makes the process here fundamentally unfair. This is not, as suggested in the Neely dicta, analogous to the granting of a judgment notwithstanding the verdict because such a judgment could be appealed for analysis by a higher court, and because decisions of this magnitude should be made by the trier of fact and not by a court once-removed from the facts. Slocum v. New York Life Insurance Co., 228 U.S. 364 (1913).

Those who favored juries historically believed that a jury would reach a result that a judge either could not or would not reach. Parklane Hosiery Co. v. Shore, 439 U.S. 232, 344 (1978)(Rehnquist, J., dissenting).

The first Congress expected the Seventh Amendment to meet the objections of men like Patrick Henry to the Constitution itself. Henry, speaking in the Virginia Constitutional Convention, had expressed the general conviction of the people of the thirteen states when he said, "... (w)e are told that we are to

part with that trial by jury with which our ancestors secured their lives and property ... I hope we shall never be induced, by such arguments, to part with that excellent mode of trial. No appeal can now be made as to fact in common law suits. The unanimous verdict of impartial men cannot be reversed." Quoted in Galloway v. United States, 319 U.S. 372 (1943)(Black, J., dissenting).

The Seventh Amendment requires that the right of trial by jury be "preserved." Because the Seventh Amendment demands preservation of the jury trial right, our cases have uniformly held that the content of the right must be judged by historical standards. See: Curtis v. Loether, 415 U.S. 189, 193 (1974); Ross v. Bernhard, 396 U.S. 531, 533 (1970); Capital Traction Co. v. Hof, 174 U.S. 1, 8-9 (1899). Thus, in Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657 (1935), the Court stated that "(t)he right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted."

The Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law of 1791, any more than it tied them to the common-law system of pleading or the

specific rules of evidence then prevailing. To say that the Seventh Amendment does not tie federal courts to the exact procedure of the common law in 1791 does not imply, however, that any nominally "procedural" change can be implemented, regardless of its impact on the functions of the jury. For to sanction the creation of procedural devices which limit the province of the jury to a greater degree than permitted at common law in 1791 is in direct contravention of the Seventh Amendment. See: Neely, supra, at 322; Dimick v. Schiedt, 293 U.S. 474, 487 (1935); Ex Parte Peterson, 253 U.S. 300, 309-10 (1920).

Because we deal here not with the common law qua common law but with the Constitution, no amount of argument that summary appellate reversal provides for more efficiency or more accuracy or is fairer will save it if the degree of invasion of the jury's province is greater than allowed in 1791. To rule otherwise would effectively permit judicial repeal of the Seventh Amendment because nearly any change in the province of the jury, no matter how drastic the diminution of its functions, can always be denominated "procedural reform."

The guarantees of the Seventh Amendment will prove burdensome in some instances; the civil jury surely was a burden to the English

governors who, in its stead, substituted the vice-admiralty court. But, as with other provisions of the Bill of Rights, the onerous nature of the protection of a jury verdict and of a trial does not and cannot justify contracting the rights secured by the Amendment. Because "'(m)aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence ... any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.'" Dimick, supra, at 486, quoted in Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501 (1959).

The Fourth Circuit itself usually has been careful to preserve this all-important right to trial by jury, and the summary dismissal here, therefore, is not in keeping with its general practice.

The usual course of action in the Fourth Circuit, where a detailed, independent review is sought, is to remand the case to the trial court for the making of further findings. Where a trial court fails to make findings or to find on a material issue, and an appeal is taken, an appellate court normally will vacate the judgment and remand the action for appropriate findings to be made. Mayo v. Lakeland Highlands Canning Co., 309 U.S. 316 (1940).

There was nothing improper per se about imputing the actions of Henry, an agent of the College and a member of the interview committee, to the College and the committee. Title VII itself holds that he is such an agent. If the appellate court felt that adequate findings had not been made, it therefore should have remanded the case to the trial court, and it should not have usurped the role of the trial court and considered the facts de novo. Owen v. Commercial Union Fire Insurance Co., 211 F.2d 488 (4th Cir. 1954); Patrician Towers Owners, Inc. v. Fairchild, 513 F.2d 216, 221-2 (4th Cir. 1975); Lewis v. Tobacco Workers International Union, 577 F.2d 1135, 1147 (4th Cir. 1978); United States v. Commonwealth of Virginia, 569 F.2d 1300, 1303 (4th Cir. 1978); E.E.O.C. v. United Virginia General/Seaboard National, 555 F.2d 403, 406 (4th Cir. 1977).

This is true particularly where, as here, the credibility choices of the trial court were entitled to great deference on appeal. Corley v. Jackson Police Department, 566 F.2d 994, 1001 (5th Cir. 1978); Morelock v. N.C.R. Corp., 546 F.2d 682 (6th Cir. 1976).

It is also true where it may be important to know which of alternate grounds most influenced the jury. Mosley v. CIA, MAR, ADRA, S.A., et al, 314 F.2d 223 (2d Cir. 1963), cert.

den. 375 U.S. 835 (1963); Hammitte v. Livesay, 436 F.2d 1134 (6th Cir. 1971).

C. The Appellate Court Applied the Wrong Standard in its Analysis of this Case.

To support a finding of failure to make out a prima facie case, the appellate court was obligated to examine Hart's case critically, in the light most favorable to Hart, which it did not do; and to show specifically, as it did not do and could not do, how that case was defective and where it failed to meet its burden. Chambers v. G.D. Searle & Co., 441 F.Supp. 377 (D.C. Md. 1977), aff'd 567 F.2d 269 (4th Cir. 1977); Walker Mfg. Co. v. Dickerson, Inc., 560 F.2d 1184 (4th Cir. 1977). On a defendant's motion for a directed verdict, the court must view the evidence in the light most favorable to the plaintiff and must indulge every reasonable inference in the plaintiff's favor. Every fact in evidence and every inference reasonably inferable therefrom, in support of the plaintiff's theory of the case, must be assumed to be true on a motion for a directed verdict. Shelton v. Jones, 356 F.2d 426 (4th Cir. 1966).

Thus, even if the appellate court was not convinced by the evidence, and even if it would have decided otherwise had it been

hearing the case, it cannot fairly substitute its judgment for that of the jury. The appellate court was bound to the "clearly erroneous" standard. The various evidentiary submissions brought forward by Hart as to various behaviors toward him and the conclusions drawn by the jury from them cannot be fairly dismissed as "clearly erroneous."

Hart set out a history of prejudicial action on the part of Henry, action which impacted on all the others involved in the screening of applicants for the job Hart sought, and that evidence was correctly sent to the jury by the trial judge. The appellate court simply accepted the arguments of the College when it stated that "there is nothing in the record to support the contention that Henry's racial prejudice, if any, had any bearing on the actions of either the search committee or CCB." The appellate court could not see that the specific actions of Henry, brought out in testimony, were sequentially analyzed by the trial court. The appellate court gives no indication that it looked at the effect of Henry's "hospital letter" on members of that committee. In order to examine Hart's case in the light most favorable to him, as it was bound to do, the appellate court ought to have considered these items, including in particular the awareness of the

"hospital letter" on the part of the interview committee. (App. 271-2) The appellate court simply was not correct when it observed that "there was no evidence that Henry influenced the members of the search committee to reject Hart because of his race or handicap." The sequence of events dating from the "hospital letter" leads to a contrary conclusion.

The jury, rather than the appellate court, was the proper body to evaluate the significance of this evidence; and the jury, not the appellate court, had the opportunity to evaluate the credibility of the witnesses as they attempted to explain their actions.

The appellate court has improperly adopted Respondents' version of the events, and, therefore, has been able to make the summary statement that Hart "contends that Henry's racial bias toward him infected and dominated the evaluation of the search committee by means of an existing 'old boy network.'" Hart did more than merely contend, however. He presented evidence, tied it together, and made judge and jury see and understand the interconnections amongst the men who evaluated him, and what those interconnections meant. Had the appellate court analyzed the evidence behind this second contention with the same attention it directed toward the first "white token" contention, it would have

seen that Hart certainly did present a prima facie case which, therefore, properly was sent to the jury. Instead, the appellate court stressed the "white token" problem particularly and summarized the rest, thereby distorting what actually happened at trial, a distortion seen by neither judge nor jury, a distortion which completely skews the step-by-step accumulation of facts presented to judge and jury, a distortion which permitted the appellate court to overlook all the material facts that, taken together, convinced the judge that the case should go to the jury and persuaded the jury, and, then, the judge, to render verdicts.

CONCLUSION

For all these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

BARBARA GOLD,
1520 Fidelity Building,
210 North Charles Street,
Baltimore, Maryland 21201,
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of November, 1980, three copies of the aforegoing Petition for Writ of Certiorari and Appendices were hand-delivered to JOHN S. WOOD, ESQUIRE, Assistant City Solicitor, City Hall, Baltimore, Maryland 21202, and that all parties required to be served have been served.

BARBARA GOLD

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1443

RANDY L. HART

v.

MAYOR AND CITY COUNCIL OF BALTIMORE
(COMMUNITY COLLEGE OF BALTIMORE), et al

ORDER

Filed: August 18, 1980

Upon consideration of the appellee's petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Hall for a panel consisting of Judge Bryan, Judge Russell, and Judge Hall.

For the Court,

/s/ William K. Slate, II
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1443

RANDY L. HART

v.

MAYOR AND CITY COUNCIL OF BALTIMORE (COMMUNITY COLLEGE OF BALTIMORE); JAMES HENRY, Assistant Director, Veterans Upward Bound, Community College of Baltimore, in his individual and representative capacity

Appellants

and

RAFAEL L. CORTADA, President, Community College of Baltimore, in his individual and representative capacity

Defendant

Appeal from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, Chief District Judge.

Argued: June 2, 1980 Decided: July 10, 1980

Before BRYAN, Senior Circuit Judge; RUSSELL and HALL, Circuit Judges.

John S. Wood, Assistant City Solicitor (Benjamin L. Brown, City Solicitor, Ambrose T. Hartman, Deputy City Solicitor, Elise Jude Mason, Chief Solicitor on brief) for Appellants; Barbara Gold for Appellee.

HALL, Circuit Judge:

The mayor and City Council of Baltimore (Community College of Baltimore (CCB)) appeal from the judgment of the district court that they had engaged in job discrimination against Randy L. Hart on the basis of race or handicap. Hart had brought an action under Title VII of the Civil Rights Act of 1964 (42 U.S.C., Section 2000e et seq.), 42 U.S.C. Sections 1981, 1983, and Sections 504 of the Rehabilitation Act of 1973 (29 U.S.C. Section 794), alleging that he had been denied a position as a counselor for the Veterans Upward Bound program at CCB because of his race or handicap.[1] The district court submitted the section 1981, 1983 and 794 claims to a jury. At the close of the evidence, the trial judge granted directed verdicts for all defendants on all issues except for a section 1983 claim against James Henry, the Assistant Director of the Program,

in his individual capacity. The jury returned a verdict against Henry in the amount of $7,500.

The Title VII claim was then tried to the district judge who stated that he felt compelled to accept the earlier jury finding of discriminatory intent on the part of Henry. Judgment of $31,452 as back pay was then awarded against CCB and Henry on the Title VII action.

The gravamen of appellants' attack on this judgment is that Hart has failed to establish a prima facie case of employment discrimination by appellants on the basis of race or handicap. We agree with appellants' contention and reverse the judgment of the district court.

The evidence shows that in December 1976 a position as full-time counselor in the Program became vacant. A search committee of six persons associated with CCB and various related veterans' programs interviewed and independently evaluated 12 candidates for the opening. At the conclusion of the interviews, the evaluation sheets were collected and the tabulated results showed: Benjamin Smith (a black male) -- 71 points; Donette Emory Green (a black female) -- 70 points; Randy L. Hart (a white male) -- 69 points; and

all other candidates less than 69 points.[2] The job was offered first to Smith, who declined it in favor of a more lucrative offer, and then to Green, who accepted it.

Hart claims that Henry's racial animosity toward him was manifested in at least two ways. First, Hart alleges that he was referred to as the "token white" in the Program. And second, he contends that Henry's racial bias toward him infected and dominated the evaluation of the search committee by means of an existing "old boy network."

Our review of the record fails to disclose any evidence of employment discrimination on the basis of race or handicap [3] under any of appellee's legal theories. The term "token white" was apparently used by some of Hart's coworkers, and Henry had made passing reference to their remarks during conversations with Hart. However, even if Henry had called Hart a "token white," there is nothing in the record to support the contention that Henry's racial prejudice, if any, had any bearing on the actions of either the search committee or CCB. The allegation of an "old boy network" was based on mere speculation, and there was no evidence that Henry influenced the members of the search committee to reject Hart because of his race or handicap.

The district court therefor committed two errors. First, it failed to grant a directed verdict for Henry in his individual capacity when, as a matter of law, Hart had not shown a prima facie case of discrimination by Henry based on race or handicap. Second, the trial court compounded its initial error by imputing the prior jury finding of Henry's discriminatory intent to the entire search committee and CCB in the Title VII claim without making an independent review of the evidence.

Accordingly, we hold that as a matter of law Hart has failed to establish a prima facie case of race or handicap discrimination regarding employment as a counselor and that the lower court should have granted a directed verdict for all defendants in this action. Therefore, the judgment of the district court is reversed and the complaint dismissed.

REVERSED.

FOOTNOTES

[1] The handicap referred to was a rating of 30% disability due to a chemical imbalance of lithium which intermittently affects Hart's emotional state. However, the evidence at trial showed that most people familiar with Hart were unaware of this condition and that his chemical imbalance did not adversely affect his job performance.

[2] It is interesting to note that Henry rated Smith first with 13 points and Green and Hart

each next with 12 points.

[3] During oral argument on appeal, counsel for Hart conceded that no genuine claim existed for employment discrimination on the basis of handicap. Thus, we do not further address the merits of this issue.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. N-78-1355

RANDY L. HART

v.

MAYOR AND CITY COUNCIL OF BALTIMORE (COMMUNITY COLLEGE OF BALTIMORE), JAMES HENRY, Assistant Director of Veterans Upward Bound, Community College of Baltimore, Defendant, in his individual and representative capacity and DR. RAFAEL L. CORTADA, President, Community College of Baltimore, Defendant, in his individual and representative capacity

---

Filed: May 17, 1979

Barbara Gold of Baltimore, Maryland for plaintiff.
Benjamin L. Brown, City Solicitor for Balti-

more City, and John S. Wood, Assistant City Solicitor, for defendants.

Northrop, Chief Judge.

Plaintiff, Randy L. Hart, is a former employee of the Veterans Upward Bound program at the Community College of Baltimore (CCB). He sued the College,[1] its current president, Dr. Rafael L. Cortada, and the assistant director of the Veterans Upward Bound program, James Henry. Plaintiff claims he was the victim of discrimination in hiring on the basis of his race and/or handicap.

The action was based on Title VII of the Civil Rights Act of 1964 (42 U.S.C. Sections 2000e et seq.), 42 U.S.C. Sections 1981, 1983, and Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. Section 794). From March 28 to April 3, 1979, the case was tried to the jury on the Section 1981, Section 1983 and Rehabilitation Act claims. At the conclusion of all the evidence, the Court dismissed Dr. Cortada from the entire case and dismissed the College from the jury aspect of the case. The jury returned a verdict for the plaintiff against defendant Henry in the amount of $7,500.00. The equitable back pay issues under Title VII were left for the Court.

On April 12, 1979, a hearing was held before the Court on the Title VII issues. At

that time, the parties agreed that, if the plaintiff were entitled to back pay, the amount due would be $31,452. Defendants, however, argue than the plaintiff is not entitled to back pay.

The defendants' only argument with regard to back pay is that plaintiff did not prove a prima facie case, in that he failed to prove any discriminatory intent on the part of any defendant. The Court concludes, however, that it cannot make an independent finding with respect to discriminatory intent. The jury was instructed clearly that it could only find for the plaintiff if it found that defendant Henry had acted with discriminatory intent.[2] The fact that the jury found for the plaintiff means that the jury must have found discriminatory intent.

The basic principles of collateral estoppel preclude the Court from making findings of fact inconsistent with the jury's determinations. When a case involves both legal and equitable claims, it is the province of the jury to decide issues common to both. See Curtis v. Loether, 415 U.S. 189, 196 n. 11 (1974); Burt v. Board of Trustees, 521 F.2d 1201, 1206 (4th Cir. 1975); Marshall v. Electric Hose & Rubber Co., 413 F.Supp. 663, 668 (D. Del. 1976); Prudential Ins. Co. of Amer-

ica v. Bonney, 299 F.Supp. 794 (W.D. Okla. 1969); cf. Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

Since defendants proffer no other reason to deny the back pay, the Court must enter judgment for the agreed amount. A separate judgment will be entered in the case.

/s/ Edward S. Northrop
Chief United States
District Judge

FOOTNOTES

[1] On April 27, 1979, the Court granted plaintiff's motion to change the name of the defendant college from "Community College of Baltimore" to "Mayor and City Council of Baltimore (Community College of Baltimore)" to reflect the proper status of the College as an agency of the City.

[2] The relevant part of the jury instructions read as follows:

You are instructed that, in order to prove that there was intentional discrimination against the plaintiff, Hart, on the basis of race or handicap, and thereby a deprivation by a defendant of the plaintiff's constitutional right to the equal protection of the laws, the preponderance of the evidence must establish all of the following essential elements: ...

(5) That in taking the actions or inactions he did, the defendant was motivated by an intent or purpose to discriminate against the plaintiff on the basis of his race or alleged handicap.

You are instructed that, in order to find that a motivating factor in a defendant's acts or failures to act was the plaintiff's race or handicap, it must be established by a preponderance of the evidence that plaintiff was handicapped and that the fact that plaintiff was handicapped or was caucasian entered into the defendant's decision to act or not to act, and that defendant had an intent or purpose to discriminate against him on the basis of race or handicap.

Intent ordinarily may not be proved directly. But you may infer a person's intent from all the surrounding circumstances. You may consider any statement made or act done or omitted by a party whose intent is in issue, and all other facts and circumstances which indicate his state of mind. In determining whether or not the plaintiff's race or alleged handicap was a motivating factor in a decision to act or failure to act, and whether or not the defendant had an intent or purpose to discriminate against him on the basis of race or alleged handicap, you should consider, among other evidence:

(1) the background of the decision, and particularly whether or not it reveals a series of official actions taken for discriminatory purposes;

(2) the specific sequence of events leading up to the challenged decision;

(3) consistency with, or departures from, any of the normal procedural sequence;

(4) whether or not the factors usually considered important by the decisionmaker strongly favor the decision reached or one contrary to the decision reached; and

(5) any statements made at the time of the decision by the decisionmaker or documents reflecting statements made at the time of the decision about the reasons for that decision.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. N-78-1355

RANDY L. HART

v.

MAYOR AND CITY COUNCIL OF BALTIMORE (COMMUNITY COLLEGE OF BALTIMORE), JAMES HENRY, Assistant Director, Veterans Upward Bound, Community College of Baltimore, Defendant, in his individual and representative capacity and DR. RAFAEL L. CORTADA, President, Community College of Baltimore, Defendant, in his individual and representative capacity

---

JUDGMENT

This action came on for trial before the Court on the issues under Title VII, 42 U.S.C. Section 2000e et seq., and before a jury on the issues under 42 U.S.C. Sections 1981, 1983, and the Rehabilitation Act of 1973, 29 U.S.C. Section 794, and the issues having been duly tried and the jury having duly rendered its verdict and the Court having issued

its opinion, it is ORDERED and ADJUDGED:

1. That judgment BE and hereby IS, entered in favor of plaintiff in the amount of $7,500.00 against defendant James Henry.

2. That judgment BE, and hereby IS, entered in favor of plaintiff in the amount of $31,452.00 against defendants James Henry and Mayor and City Council of Baltimore (Community College of Baltimore).

Dated at Baltimore, Maryland this 17th day of May, 1979.

/s/Edward S. Northrop
Chief United States
District Judge